No. 6589
No. 6590

In the

United States Circuit Court of Appeals

For the Ninth Circuit

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SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY
a Corporation
Appellant
vs.
CHARLES A. COLE
Appellee

(TWO CASES)

Upon Appeal from the District Court of the United States for the District of Oregon

Brief of Appellant

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STATEMENT OF THE CASES

These two actions were brought by plaintiff, the father (respondent here), against defendant (appellant here), to recover damages for the loss of services on account of the death of his two minor daughters occurring at a private railroad crossing near Underwood, Washington. The cases were con-

solidated for trial and judgments in both were recovered by plaintiff.

The private crossing where the accident occurred ran from the property of the United States Bureau of Fisheries lying south of defendant's right of way, over its railroad tracks to a point of connection with the county road lying north of and parallel with the right of way. This private crossing had been constructed by the Bureau of Fisheries over defendant's railroad track and right of way under a license granted by defendant. At the time of the accident plaintiff's two daughters were riding over this private crossing in an automobile driven by their aunt, Mrs. Larson, who lived on the Bureau of Fisheries' property south of the right of way. The collision occurred between her automobile and defendant's car, resulting in the death of plaintiff's daughters.

These cases arose from the same accident as was involved in *Spokane, Portland and Seattle Railway Company v. Cecile S. Cole,* 40 Fed. (2nd) 172, decided by this court on April 30, 1930; but the issues involved in this appeal are not the same as those presented in that case. There the only charges of negligence were the alleged failure of the defendant to give warning of the approach of defendant's car and the alleged excessive speed. In the two present cases a third charge of negligence is made with respect to permitting vegetation to grow on the right

of way interfering with the view of the driver at the crossing.

In the first of these present cases, No. 6589, the daughter, Jacqueline A. Cole, was eight years old at the time of her death, and there was a verdict for $2500.00. In case No. 6590, the daughter, Leona J. Cole, was just under nineteen years of age, and there was a verdict of $2000.00.

During the trial defendant requested the court to withdraw from the jury the charge of negligence to the effect that defendant had permitted vegetation to grow upon its right of way, which request was denied. Defendant also moved for a new trial upon the ground that the court erred in refusing to withdraw from the jury the charge of negligence as to vegetation at the crossing, and upon the further ground that the verdict in each case was excessive, which motion was denied and defendant brings this appeal.

The questions presented under the specifications of error are: (1) Did the defendant owe any duty to these decedents to take affirmative steps to cut vegetation in order to make the private crossing safe for their use, so that the jury might find that defendant was negligent in failing to cut the vegetation, and (2) were the verdicts so excessive as to show that they were given under the influence of passion and prejudice.

SPECIFICATIONS OF ERROR

1. The District Court erred in declining to give to the jury defendant's requested instruction Number IV, reading as follows:

> "I instruct you that the evidence is insufficient to show any negligence on the part of the defendant in the manner in which the crossing itself was maintained with respect to the view at the crossing of train operators along the highway and of automobile operators along the railroad. Consequently, all allegations of negligence with respect to obstruction of view and the maintenance of the crossing itself are withdrawn from your consideration and you cannot base any recovery on any such allegations."

(R. No. 6589, pp. 19, 20; R. No. 6590, p. 20).

2. In No. 6589 the District Court erred in denying the defendant's motion for a new trial, made upon the ground, among others, that the damages awarded by the verdict of the jury were excessive and appeared to have been given under the influence of passion and prejudice. (R. p. 31).

3. In No. 6590 the District Court erred in denying the defendant's motion for a new trial, made upon the ground, among others, that the damages awarded by the verdict of the jury were excessive and appeared to have been given under the influence of passion and prejudice. (R. p. 32).

ARGUMENT

I.

It was error to refuse to withdraw from the jury the charge relating to the condition of the premises.

The first specification of error relates to the refusal of the court to withdraw from the jury the charge of negligence as to the condition of the crossing. The complaints charge, among other things, the negligent maintenance of the crossing in that defendant permitted the right of way to be overgrown with vegetation so as to obstruct the view of one driving over the crossing. (R. No. 6589, p. 6; R. No. 6590, pp. 5, 6). The defendant requested an instruction, which was refused, withdrawing such third charge from the jury.

The crossing at which the accident occurred is about half a mile west of Underwood, Washington. It is a private crossing, constructed under a permit from the defendant to the United States Bureau of Fisheries, in order to furnish a means of access from the county road on the north of and parallel to the track, and running to the fish hatchery grounds, which lie on the southerly side of and adjacent to the right of way. The private crossing was constructed by government employes and terminates at the hatchery. (R. pp. 20, 21).*

*References, unless otherwise noted, are to pages in the Transcript of Record in No. 6589. The bills of exceptions in the two cases are identical insofar as they relate to the first specification of error.

During the fishing season the crossing is used by visitors to the hatchery to the extent of about twenty cars a day, but during other seasons it is used almost exclusively by those who work and live at the hatchery. (R. pp. 22, 23). It is used only by persons who for reasons of business or pleasure have occasion to go to the hatchery.

Mr. Larson, an uncle of the two decedents, was an employe at the hatchery, and his wife and family lived on the hatchery grounds. Decedents, with their mother, Cecile S. Cole, had been visiting at the Larson home. Mrs. Larson and Mrs. Cole, with their children, including the decedents, were leaving the hatchery grounds at the time of the accident. (R. p. 23).

There was evidence that vegetation grew on the railroad right of way which interfered with the view of the track from the crossing. (R. pp. 23-26). But the undisputed evidence showed that the relation between the defendant and each of the two decedents was that of licensor and licensee, so that there was no duty resting on the defendant to maintain its premises free from vegetation and consequently there was no evidence upon which the jury could predicate a finding that the defendant was negligent in the particular respect charged.

The duties and obligations of the owner of land with respect to the condition of the premises vary, depending upon the relationship between the owner

and the person injured. To the trespasser the owner owes no duty whatever except to refrain from wilful or wanton injury after the presence of the trespasser is discovered; with respect to the condition of the premises the owner owes no duty to a trespasser other than to refrain from setting traps. *United Zinc & Chemical Co. v. Britt,* 258 U. S. 268; 42 S. Ct. 299. To the licensee the owner owes a positive duty to refrain from *active* negligence when the presence of the licensee is known or may reasonably be anticipated. But there is no duty to make the premises safe; the licensee takes the premises as he finds them subject to all risks. The owner is not responsible for mere *passive* conduct. (See authorities cited, post.) To the invitee the owner owes the higher duty, to make the premises reasonably safe. Inaction,—the failure to take steps to make the premises reasonably safe,—may be the basis of liability to an invitee. *Bennett v. Railroad Company,* 102 U. S. 577.

A person using a private crossing over a railroad right of way is a mere licensee.

The true test to determine whether one on the land of another is a licensee or an invitee is found in the language in *Bennett v. Railroad Company, supra,* wherein Mr. Justice Harlan said:

> "It is sometimes difficult to determine whether the circumstances make a case of invitation, in the technical sense of that word, as

> used in a large number of adjudged cases, or only a case of mere licensee. 'The principle,' says Mr. Campbell, in his treatise on Negligence, 'appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it'."

In *Jonosky v. Northern Pacific Railway Company,* 57 Mont. 63; 187 Pac. 1014, the court said:

> "Passing to a consideration of the duty owed to a licensee, however, we enter a veritable maze of conflicting and contradictory decisions. Much of the confusion arises from the failure of the courts to distinguish between a license and an invitation, and particularly between an implied license and an implied invitation. The distinction is not merely one of descriptive phraseology, but has its foundation in sound common sense. *An invitation is inferred where there is a common interest or mutual advantage, while a license is implied where the object is the mere pleasure, convenience, or benefit of the person enjoying the privilege.* (Citing cases). (Italics ours).

See also *Midland Valley R. Co. v. Littlejohn,* 44 Okla. 8, 143 Pac. 1; *L. E. Meyers' Co. v. Logue's Adm'r.,* 212 Ky. 802, 280 S. W. 107; *Lange v. St. Johns Lumber Co.,* 115 Ore. 337, 237 Pac. 696; *Watson v. Manitou & Pikes Peak Ry. Co.,* 41 Colo. 138, 92 Pac. 17, *Gasch v. Rounds,* 93 Wash. 317, 160 Pac. 962; *Coburn v. Village of Swanton,* 95 Vt. 320, 115 Atl. 153; *Bush v. Weed Lumber Co.,* 63 Cal. App. 426, 218 Pac. 618.

An application of the rule established by the authorities to the facts as we have summarized them

establishes that the decedents were mere licensees. The private crossing was constructed solely for the "pleasure, convenience or benefit" of the limited number of people who had occasion to go to the hatchery. There was no "common interest" between the decedents and the defendant; the use of the crossing by the decedents did not redound to the "mutual advantage" of the decedents and the defendant. They were licensees rather than invitees.

The case of *Felton v. Aubrey,* 74 Fed. 350, decided by a court including the late Chief Justice Taft, and the late Justice Lurton, is the leading authority on the duty of a railroad with respect to persons at permissive crossings. The court in that case said:

> "If the evidence shows that the public had for a long period of time, customarily and constantly, openly and notoriously, crossed a railway track at a place *not a public highway,* with the knowledge and acquiescence of the company, a *license or permission* by the company to all persons to cross the track at that point may be presumed." (Italics ours).

In *Conn v. Pennsylvania R. Co.,* 288 Pa. 494, 136 Atl. 779, the court says:

> "A permissive way *is a license* to pass over the property of another; it may be either express or implied, . . . " (Italics ours).

In *Pennsylvania R. Co. v. Breeden,* 140 Atl. 82 (Md.), the accident occurred at a crossing by a pri-

vate lane leading from a highway to a residential community. The court held that the plaintiff was a mere licensee, quoting with approval Elliott on Roads and Streets (2nd Ed.) Sec. 1019, as follows:

> " 'Unless the company has done something to allure or invite travelers to cross, or has in some manner treated it as a public crossing, we are inclined to think the better rule is that they are, *at the most, mere licensees* to whom no duty of active vigilance is ordinarily due. Mere permission or passive acquiescence under ordinary circumstances does not constitute an invitation'." (Italics ours).

And see, to the same effect, *Sypher v. Director General,* 243 Mass. 568, 137 N. E. 916; *Chesapeake & Ohio Ry. Co. v. Hunter's Admr.,* 170 Ky. 4, 185 S. W. 140; *Atlantic Coast Line R. Co. v. Carter,* 214 Ala. 252, 107 So. 218; *Johnson v. C. M. & St. P. Ry.* Co., 96 Minn. 316, 104 N. W. 961; *Pomponio v. N. Y. N. H. & H. R. Co.,* 66 Conn. 528, 34 Atl. 491.

The owner of land is under no duty to make the premises safe for a licensee. His only duty is to refrain from affirmative acts of negligence when the presence of the licensee is known or may reasonably be anticipated.

The rule as to the duty which a landowner owes to a licensee with respect to the condition of the premises is stated in 45 Corpus Juris 798, as follows:

> "A mere licensee takes the property on which he enters as he finds it, enjoys the license subject to its concomitant perils, and assumes all the ordinary risks incident to the condition of the property and the manner of the conduct of the owner's business thereon. *Accordingly, the owner or person in charge of property is ordinarily under no duty to make or keep the property in a safe condition for the use of licensees;* . . . " (Italics ours).

This rule is universally accepted. *Smith v. Day,* 100 Fed. 244 (9th C. C. A.); *Rhode v. Duff,* 208 Fed. 115 (8th C. C. A.); *Branan v. Wimsatt,* 298 Fed. 833 (D. C. C. A.); *Peebles v. Exchange Building Co.,* 15 Fed. (2nd) 335 (6th C. C. A.).

The specification of negligence which we are now considering consists merely of a charge that the defendant allowed its premises to be in an unsafe condition. By the failure to cut vegetation the view of travelers on the private lane was somewhat obscured. That constituted a mere condition of the premises and unless there is some duty on railroad owners, which is not imposed on property owners generally, there was no basis for submission of this charge to the jury.

There is no exception to the general rule as it relates to the condition of railroad premises. In *Northern Pacific Railway Company v. Curtz,* 196 Fed. 367, this court held that a boy who was in a box car sweeping loose grain, with the knowledge and acquiescence of the railway company, was a

licensee. The plaintiff was permitted to recover for negligence consisting of a sudden movement of the car without warning to the plaintiff. This court said:

> "The occupant or owner of premises who invites, either expressly or impliedly, others to come upon them, owes to them the duty of using reasonable and ordinary diligence to the end that they be not necessarily or unreasonably exposed to danger; . . . *This doctrine has often been applied to cases where a railroad company permits the public to cross its tracks between given points,* and it is universally held that, where for a considerable period persons have been accustomed so to cross a railroad track, the employes of the company in charge of its trains are required to take notice of that fact, and to use reasonable precautions to prevent injury to persons whose presence there should be anticipated."

The basis of the rule applied in the Curtz case is found in the last clause of the quotation, "persons whose presence should be anticipated." When a landowner knows of or may reasonably anticipate the presence of a licensee, it is then his duty to refrain from active, affirmative negligent acts which may result in injury. But he is not required to prepare his premises in advance in anticipation of the coming of the licensee. The rule is clearly stated in *John P. Pettyjohn & Sons v. Basham,* 126 Va. 72, 100 S. E. 813, wherein the court said:

> "In the case of licensees, the occupant is charged with knowledge of the use of his prem-

> ises by the licensee, *and, while not chargeable with the duty of prevision or preparation for the safety of the licensee,* he is chargeable with the duty of lookout, with such equipment as he then has in use to avoid injury to him at the time and place where the presence of the licensee may be reasonably expected." (Italics ours).

The best exposition on the subject of the duties of an owner of land is found in *Felton v. Aubrey, supra,* the decision of Judge (later Justice) Lurton. That case is the first of those cited by this court in support of the language which we have quoted from *Northern Pacific Railway Company v. Curtz, supra.* The doctrine taught in *Felton v. Aubrey* is that though a landowner may be under the duty of anticipating the presence of and keeping a lookout for a licensee, so that the owner may be liable for *affirmative conduct,* he cannot be held for mere *passive conduct.* In that case a boy was struck by a train at a place which the public had long used as a crossing, with the knowledge and acquiescence of the company. The evidence tended to show that the train was operated without any warnings to those who might be using the crossing. In making the distinction between the consequences of active and passive conduct under such circumstances, the court said:

> "It seems to us that many of the American cases which we have cited fail to draw the proper distinction between the liability of an owner of premises to persons who sustain injuries as a

result *of the mere condition of the premises* and those who come to harm by reason *of subsequent conduct of the licensor, inconsistent with the safety of persons permitted to go upon his premises,* and whom he was bound to anticipate might avail themselves of his license. This distinction seems to be sharply emphasized in the case of Corby v. Hill [4 C. B. (N. S.) 556], and is a distinction which should not be overlooked. If there be any substantial difference between the legal consequence of permitting another to use one's premises and inviting or inducing such use, the distinction lies in the *difference between active and the merely passive conduct of such a proprietor.* It may be entirely consistent with sound morals and proper regard for the rights of others that the owner of premises should not be held liable to one who goes upon another's premises for his own uses, and sustains some injury by reason of the unfitness of the premises for such uses, not subsequently brought about by the active interference of the owner. If such person goes there by mere sufferance or naked license, it would seem reasonable that he should pick his way, and accept the grace, subject to the risks which pertain to the situation. But, on the other hand, if, with knowledge that such person will avail himself of the license, the owner actively change the situation by digging a pitfall, or opening a ditch, or obstructing dangerously the premises which he has reason to believe will be traversed by his licensee, sound morals would seem to demand that he should give reasonable warning of the danger to be encountered. *This distinction seems to be more marked in cases where the evidence establishes in the public a permission or license to cross a railway at a given place or locality.*

> If the company has so long acquiesced in the continuous and open use of a particular place as a crossing as to justify the inference that it acquiesces in that use, it would seem to follow that it was *bound to anticipate the presence of such licensees* upon its track at the place where such crossing had been long permitted. In such a case it would not be consistent with due regard to human life, and to the rights of others, to say that such licensees are mere trespassers, or that the duty of the acquiescing company was no greater than if they were mere trespassers. Nonliability to trespassers is predicated upon the right of the company to a clear track, upon which it is not bound to anticipate the presence of trespassers. It therefore comes under no duty to a trespasser until his presence and danger are observed. But if it has permitted the public for a long period of time to habitually and openly cross its track at a particular place, or use the track as a pathway between particular localities, it cannot say that it was not bound to anticipate the presence of such persons on its track and was therefore not under obligation to operate its trains with any regard to the safety of those there by its license. *This distinction between liability for the passive and active negligence* of the owner of premises to licensees is recognized very clearly by the court of appeals of New York. Barry v. Railroad Co., 92 N. Y. 290; Byrne v. Railroad Co., 104 N. Y. 363, 10 N. E. 539." (Italics ours).

In *Northern Pacific Railway Company v. Curtz, supra,* the negligence was active, the bumping of one car against another; and this court held that the railway company was liable to the licensee whose presence should have been anticipated. So in the

other cases cited in the Curtz case. In *Garner v. Trumbull,* 94 Fed. 321, the court in the Eighth Circuit held the company liable for the affirmative act of operating a train without a lookout for those whose presence should have been anticipated. Likewise in *Thompson v. Northern Pacific Railway Company,* 93 Fed. 384, this court held the defendant liable for the affirmative act of operating without signals. And in *Northern Pacific Railway Company v. Baxter,* 187 Fed. 787, this court held the defendant liable for injury resulting from the affirmative act of performing a "flying switch."

On the other hand where the conduct of the defendant was merely passive, the defendants were excused in *Branan v. Wimsatt, supra,* and *Peebles v. Exchange Building Company, supra.* In the *Branan* case (Court of Appeals, District of Columbia), the negligence alleged related to the manner in which lumber was piled on the defendant's premises. In the *Peebles* case (Sixth Circuit, C. C. A.) the alleged negligence was the failure to light a stairway. In each case the court held that the defendant was not responsible for injuries to a licensee resulting from an unsafe condition of the premises.

Today, in large measure because of the clear exposition by Judge Lurton in *Felton v. Aubrey, supra,* the distinction between liability to licensees for active as distinguished from passive conduct is almost universally recognized by American courts.

In 49 A. L. R., at page 778, there is an extensive annotation on the subject.

A failure to cut weeds at a private crossing is, at most, non-feasance. It is only passive conduct and is not negligence at all; it is merely a circumstance as to the condition of the premises. For that the railroad company is not responsible to a licensee who may choose to use the crossing.

The rule of non-liability to a licensee for non-feasance, for the condition of the premises, applies to private railroad crossings just as it does to any other real property. This was clearly stated in *Felton v. Aubrey, supra.* The rule of non-liability for injuries to licensees at private crossings, resulting from the condition of the premises, has been directly applied in the cases from the jurisdictions where the courts have had occasion to consider the subject. In *Johnson v. C. M. & St. P. Ry. Co., supra,* the court held that the defendant was not liable for an injury to a licensee resulting from a defective condition of a farm crossing. In *Pomponio v. N. Y. N. H. & H. R. Co., supra,* in speaking of injuries sustained at a private crossing, the court said:

> "A licensee must take the premises as he finds them, and the owner is not, as to him, bound to use care and diligence to keep the premises safe, while he does owe such a duty to one using his premises upon invitation."

In *Atlantic Coast Line Co. v. Carter, supra,* the court said:

"But, notwithstanding any consideration that may be thought to have been imported into the case by the presence of weeds and bushes on the right of way, *the crossing was, at best, for plaintiff's intestate, a private crossing, he was a mere licensee, he took the crossing as he found it,* and the duty the defendant owed him was that stated by the authorities heretofore cited. There are cases holding—properly, no doubt—that the fact that weeds and bushes are allowed by a railroad company to grow upon its right of way so as to obstruct a view of the track at the crossing of a public highway may be considered in determining the question of negligence in the operation of trains at such crossing, but not as actionable negligence *per se. Corley v. Railway,* 133 P. 555, 90 Kan. 70, Ann. Cas. 1915B, 764; *Cowles v. Railroad,* 66 A. 1020, 80 Conn. 48, 12 L. R. A. (N. S.) 1067, 10 Ann. Cas. 481, and cases cited in the notes. But that rule is applied, not indiscriminately to all crossings, but to the crossings of public highways." (Italics ours).

And see *Sypher v. Director General, supra; Bryant v. Missouri Pacific Ry. Co.,* 181 Mo. App. 189, 168 S. W. 228; *New Orleans Great Northern R. Co. v. McGowan,* 71 So. 317 (Miss.); *Atchison, Topeka & Santa Fe Ry. Co. v. Parsons,* 42 Ill. App. 93.

The error in the submission to the jury of the charge relating to the mere condition of the crossing requires a reversal of the judgments.

II.

The Verdicts Were Excessive

The second and third specifications assert error in the refusal of the District Court to grant a new trial upon the ground that the verdict in each case was excessive. The second specification relates to the recovery of $2,500 in No. 6589, involving the death of Jacqueline A. Cole. The third specification is similar except that it relates to the recovery of $2000 in No. 6590, involving the death of Leona J. Cole.

The actions were brought under the provisions of the statutes of Washington, the state in which the action arose. Section 184, Remington's Compiled Statutes, upon which each of the actions is based (R. p. 4) provides:

> "A father, or in case of the death or desertion of his family, the mother may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward."

By the terms of the Washington statutes a child attains majority at the age of twenty-one years. (R. p. 5).

Since the right of a parent to recover for the loss of services of which he has been deprived by reason of the death of a minor child is statutory, we must look to the decisions of the Washington courts to determine the extent of the right.

In addition to Section 184, quoted above, there are other Washington statutes relating to actions for death by wrongful act as follows:

Section 183:

> "When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony."

Section 183-1:

> ". . . If there be no wife or husband or child or children, such action (under Section 183) may be maintained for the benefit of the parents, sisters or minor brothers, *who may be dependent upon the deceased person for support,* and who are resident within the United States at the time of his death. In every such action the jury may give such damages as, under all circumstances of the case may to them seem just." (Italics ours).

Section 194:

> "No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife, or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife, or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then

in favor of his parents, sisters, or minor brothers *who may be dependent upon him for support,* and resident in the United States at the time of his death." (Italics ours).

These statutes were construed in *Machek v. City of Seattle,* 118 Wash. 42, 203 Pac. 25. In that case the administrator of the estate of a minor brought an action to recover $35,000. The action was prosecuted for the benefit of the father and mother, dependent upon the minor decedent for support. In distinguishing the various rights, the court said:

"Taking the exact situation which is presented by the complaint in this case, involving the death of a minor leaving no husband or child or children, but only dependent parents, we have this result, that the *administrator could maintain an action* for the benefit of the parents to recover the amount that would have been contributed by the deceased to their support; this amount *not* being limited to what would have been furnished during decedent's minority only. Or, *in the alternative,* the parents themselves, whether dependent or not, could maintain an action in their own name for the loss of services of the minor, *from the time the loss was occasioned until such time as the minor would have arrived at majority. And in addition to either one of the foregoing actions,* under either sections 183 or 184, the administrator could maintain an action, under section 194, in favor of the dependent parents for the damages suffered by the deceased from the time of the injury until death. This action is entirely independent of actions under either section 183 or section 184, and could be concurrently maintained with

> actions under either one of those sections." (Italics ours).

A condition necessary to the existence of the right of an administrator under either Section 183 or Section 194 is dependency of the beneficiaries upon the decedent. In neither of the present cases was there any allegation that the plaintiff, the father, was dependent on the decedent for support. He sues in his individual capacity as he is permitted to do by Section 184. Consequently the right to recover is limited to the "loss of services of the minor, from the time the loss is occasioned until such time as the minor would have arrived at majority." The Washington rule as to measure of damages in such an action was stated in the early case of *Hedrick v. Ilwaco Ry. & Nav. Co.,* 4 Wash. 400, 30 Pac. 714, wherein the court said:

> "The measure of damages in such cases is the value of the child's services from the time of the injury until he would have attained the age of majority, *taken in connection with his prospects in life, less the cost of his support and maintenance."* (Italics ours).

We must inquire, then, whether the two verdicts were so clearly in excess of the probable future value of the services of these two minors, up to the time each would have attained majority, considering their "prospects in life," with the deductions for the cost of support.

Inasmuch as most of the evidence as to earnings was introduced in case No. 6590, we will reverse the order of the second and third specifications of error and will discuss case No. 6590 first.

The Verdict in No. 6590, Leona J. Cole

Leona J. Cole, the decedent, was 18 years 10½ months old at the time of her death, so that, had she lived, she would have attained her majority in 2 years 1½ months. She was intelligent, industrious and in good health. She completed grammar school at the age of 12, and attended high school for three and a half years. Her prior earnings had included wages for packing apples for three-month periods each fall. For this she received $3.50 a day. Other than that she had performed general housework at intervals for a wage of $10 a week. (R. pp. 27, 28).* Her earnings were turned over to her parents, who paid her living expenses. Her clothes were not expensive; many were made by her mother. The family lived modestly. (R. p. 28).

Her actual earning power at the time of her death can be calculated within very narrow limits.

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*In this portion of the brief, relating to damages in the Leona J. Cole case, the references are to pages in the Transcript of Record in No. 6590.

Earnings from packing apples—$3.50 per day for 3 months each fall (assuming 25 working days each month, or 75 working days per season)	$262.50
Intermittent employment at general housework at $10 per week (assuming constant employment for periods when not engaged in packing apples)	390.00
Total annual earnings	$652.50

At $652.50 per year, her earnings for 2 years 1½ months would have been $1386. From this total the cost of her living—her food, shelter and clothing—must be deducted. If we assume the cost of her support and maintenance at as little as $10 a month the cost for 2 years 1½ months would have been $255. On that basis the net loss to her father occasioned by her death is only $1131. That is a maximum figure because we have assumed constant employment during those periods when she was not packing apples, whereas the evidence shows only intermittent employment. Likewise we have used a figure of $10 per month for expense which would be insufficient to sustain life.

The verdict of $2000 is nearly double this maximum figure sustained by the evidence. Courts are loath to set aside a verdict of a jury as excessive. Particularly do appellate courts hesitate to declare a verdict excessive when the trial court has declined to grant a new trial upon that ground. Nevertheless when there is a complete absence of any show-

ing to support an award, it is the duty of the appellate court to see that an injustice is not perpetrated.

When the interval from the date of death to the date that the minor would have attained her majority is short, the probable amount of future earnings can be determined within narrow limits; it is a matter susceptible of direct proof. There is little room for the exercise of discretion by the jury; and to permit a jury to ignore the evidence is to give to it a discretion which it does not possess. The only conclusion possible under these facts is that the verdict was excessive. This court should correct the error by reversing No. 6590 and ordering a new trial.

The Verdict in No. 6589, Jacqueline A. Cole

Jacqueline A. Cole was 8 years 8½ months old at the date of her death. She was in the fourth grade in school. Her school work was above average. The plaintiff, her father, intended that she should go through high school. She was active and her health was good. (R. pp. 26-27).

With 4½ years of grammar school and 4 years of high school ahead of her she would have been between 17 and 18 years of age before she could begin to earn steadily. Her contribution from earnings to her father could not, at most, have exceeded a period of 4 years before she reached majority. Her father

at most has been deprived only of earnings for 4 years less the cost of her support for 12 years 3½ months.

If we assume a future earning power equal to that of her older sister, Leona, as hereinbefore discussed, her total earnings for 4 years would have been $2610. The cost of her maintenance and education, at the same low rate of $10 a month, would have amounted to $1475. Her net earnings, of which the father has been deprived would not have been over $1135.

With that evidence before it, the jury awarded $2500, in No. 6589. In the case of a young child the probable future earnings cannot be determined with as much certainty as in the case of a child nearly 21 years old. We recognize that the jurors in the exercise of their best judgment could not fix the damages as exactly as in the case of an older child. Nevertheless, when the recovery is over 100 per cent greater than an amount computed on the basis of the only figures given in the testimony of the witnesses, it must be apparent that the jury has gone far beyond the limits of any evidence in the case.

We urge that the trial court committed error in submitting to the jury the charge of negligence with reference to vegetation obstructing the view at the crossing, because no duty was owed to the decedents in that respect. We further submit that the verdicts

in both cases go beyond any evidence of earnings and were excessive. These errors were prejudicial, and because of them the cases should be reversed.

Respectfully submitted,

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